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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

NO. 07-1566

RICHARD MARCUM,
Petitioner,
v.
DON ROPER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Procedural History

Petitioner filed his petition for writ of habeas corpus on June 7, 2002. After pleading by respondent and petitioner, United States Magistrate Audrey G. Fleissig issued an order finding the habeas petition was timely (App. 54). After additional briefing by respondent and petitioner, Magistrate Fleissig issued a Memorandum and Order granting the petition (App. 53). The district court issued a writ of habeas corpus based on that order (App. 53). The district court based its decision upon its conclusion that petitioner received ineffective assistance of trial counsel because counsel did not competently present a diminished capacity defense (App. 97).

The state appealed. The court of appeals concluded that trial counsel acted reasonably in obtaining one psychiatric expert and not more (App. 49-51). The court of appeals also concluded that petitioner did not demonstrate Strickland prejudice in the presentation of the diminished capacity defense (App. 41-48). Without dissent, the court of appeals declined rehearing en banc (App. 101).

Statement of Facts

The state charged Richard L. Marcrum by information in the Jefferson County Circuit Court, Missouri on September 13, 1994, with first degree murder, §565.020.1, RSMo. 1994 and armed criminal action, §571.015.1, RSMo. 1994. The sufficiency of the evidence is not in dispute. Viewed in the light

most favorable to the verdicts, the evidence presented at jury trial showed the following:

In June 1994 the murder victim, Reverend Kenneth Reeves, lived in Imperial, Missouri, which is in Jefferson County, along with his wife, Katie (Tr. 541-43). Reverend Reeves was pastor of Rock Presbyterian Church in Imperial; Mrs. Reeves was a schoolteacher (Tr. 542). Mrs. Reeves first met Petitioner in 1987, when he came to their home and agreed to refinish some furniture (Tr. 546-47, 577-79). Petitioner, however, did not finish the job, and he wanted more money even though he had already been paid the agreed-upon price (Tr. 547). In June 1992 Reverend Reeves fell from a tree in his yard and was paralyzed from the waist down. He was, thereafter, confined to a wheelchair (Tr. 544, 549, 588). While Reverend Reeves was in the hospital, Petitioner came to visit him. Mrs. Reeves told Petitioner that he was not welcome, and Petitioner told her she was "a bitch" and left (Tr. 549-50).

On June 2, 1994, Reverend Reeves bought a 1981 Buick, apparently on behalf of Petitioner, from Earl's Auto Sales in Imperial. He wrote a $500 check for the down payment (Tr. 556-57, 765, 767-68). Reverend Reeves cosigned a loan with Petitioner to pay for the car (Tr. 557, 768-72). This car was repossessed several weeks later because the payments had not been made (Tr. 765-66).

At about noon on June 3, 1994, Jeffrey Chism left his home, which was next to the Reeves's house, to buy some cigarettes (Tr. 194-96). As he pulled out of his driveway, Chism noticed a car parked along the road outside the Reeves' residence (Tr. 196-97). Chism thought it was unusual for a car to be parked

on that road (Tr. 196). The car was still there when Chism returned home about ten minutes later; but when Chism left for work at about 2:40 p.m. the car was gone and the police had arrived (Tr. 198-99).

Sometime between 2:20 and 2:30 p.m., Gary Paszkiewicz, who also lived next to the Reeves' house, returned home from work (Tr. 205-06). As he parked his truck in front of his house, Paszkiewicz noticed a bluish-gray car with what appeared to be a police-style spotlight parked in front of the Reeves' house next door (Tr. 206-07, 223). About 10-15 minutes later, Paszkiewicz, along with his wife and daughter, left home to pick up the couple's other children in Kimmswick (Tr. 208, 222). As the Paszkiewicz family prepared to get into their truck, they noticed a man, whom Paszkiewicz and his wife identified as Petitioner, standing by the car that Paszkiewicz had seen earlier (Tr. 209-11, 223-24). Paszkiewicz drove up, rolled down the window, and asked Petitioner if he could help him (Tr. 211, 223-24). Petitioner said, "Praise the Lord, I just killed one sorry son-of-a-bitch and I will get another." (Tr. 211, 224). Paszkiewicz asked Petitioner to repeat what he had said, and Petitioner said the same thing (Tr. 212).

Paszkiewicz then began driving towards Kimmswick, but he and his wife decided to go back because of Petitioner's statement. They dropped their daughter off at a friend's house and returned to the Reeves' home (Tr. 213-14, 225-26). When they returned, neither the car they had seen earlier nor Petitioner was there (Tr. 214, 226). Paszkiewicz and his wife got out of their truck and upon approaching the house they noticed that the front door was ajar (Tr. 214-15). They also heard "hard breathing"

coming from inside the house, as if someone was having trouble breathing (Tr. 215, 226-27). The couple entered the house and Paszkiewicz saw part of a fireplace poker, with blood on it, lying near the front door (Tr. 215-16, 227). They then saw Reverend Reeves lying on the floor in the middle of the room, where "there was blood everywhere," particularly around his head. Reverend Reeves's wheelchair had also been tipped over (Tr. 217-18, 227-28). Paszkiewicz's wife, who was a medic in the military, helped Reverend Reeves while Paszkiewicz called 911 (Tr. 219, 231). Paszkiewicz's wife found a towel and placed it under Reverend Reeves's head in an attempt to control the bleeding (Tr. 228-29). While doing so she noticed that Reverend Reeves had "multiple holes in his head." (Tr. 227). Reverend Reeves was unresponsive (Tr. 230).

When the paramedics arrived, they saw Reverend Reeves lying on the floor with blood puddled around his head (Tr. 177-79). His wheelchair was lying on its side near Reeves' feet (Tr. 179-80, 186). The paramedics also found the handle of a fireplace poker lying in the middle of the floor next to Reverend Reeves (Tr. 180-81). The hook portion of the poker was found adjacent to Reeves on another area of the floor (Tr. 186-87). Reeves had suffered severe head injuries, and one paramedic noticed that Reeves's left eye was swollen and protruding from its socket (Tr. 181-82). After placing a tube into Reeves so that he could breathe and starting an IV, the paramedics transported him by helicopter to St. Louis University Hospital (Tr. 182-84).

Meanwhile, Jefferson County sheriff deputies arrived at Reeves' residence at about 3 p.m. (Tr.

200). The first deputy arrived while Reeves was being treated by the paramedics (Tr. 200-01). As the deputy entered the home, he saw a piece of a fireplace poker several feet inside the door (Tr. 201-02). The victim, who was bleeding and had a hole in his skull, appeared to have been struck by something (Tr. 203-04).

Other deputies arrived and determined that there were no signs of forced entry; both the front and rear doors were open when police arrived (Tr. 255). They also determined that the fireplace poker had been broken into three pieces. The handle was found inside the door, and the two other pieces were located near where Reverend Reeves was lying (Tr. 241-45, 264-65). Police seized all three pieces of the poker, the center and tip of which had a considerable amount of blood on them (Tr. 269-73).

In addition to the blood pooling around the victim's body, police later discovered blood spatters around the mantel, walls, and both on the keyboard of an organ and the other fireplace tools, which were found undisturbed in a rack next to the fireplace (Tr. 245-49, 262, 264-67, 281). Blood drops were also found on a wheelchair ramp at the rear of the house and on an adjacent flagstone walk (Tr. 258-59). Police took samples of the blood found at the scene (Tr. 283, 456-58).

On the evening of the attack, June 3, 1994, the police spoke to Mrs. Reeves and asked her if she knew anyone who might have been responsible for the crime; she identified Petitioner (Tr. 405-06). Captain Edward Kemp of the Jefferson County Sheriff's office found an address for Petitioner in the 3100 block of Compton in St. Louis City and went

there (Tr. 406). Upon arriving at that address, Kemp saw a car matching the description of the car that had been parked outside the Reeves' residence. The car was parked across the street from the address listed for Petitioner (Tr. 407).

Paszkiewicz, who had seen the car outside the Reeves' residence, was brought along to identify the car, and he said that it was the same car that he had seen outside the Reeves' home (Tr. 407). Jefferson County deputies then contacted detectives from the St. Louis Metropolitan Police Department and knocked on the door of Petitioner's residence (Tr. 407). Petitioner's brother answered the door and told police that Petitioner had been taken to St. Louis Regional Hospital (Tr. 408).

Captain Kemp went to Regional Hospital and found Petitioner sitting on a gurney in the emergency room (Tr. 408-09). When Kemp identified himself to Petitioner, Petitioner said "I know why you're here, it's because of George. I killed George. I killed George. I killed George in Kimmswick. He also goes by the name of Kenny Reeves." (Tr. 409). Petitioner said he had killed Reeves because "he was a bad man" who deserved to be killed because he was evil (Tr. 409-10, 439). Petitioner was then arrested and informed of his Miranda rights (Tr. 410-11). Police also seized a gray T-shirt, blue jeans and tennis shoes that Petitioner was wearing (Tr. 328-32, 411). There were several drops of what appeared to be blood on the shoes, the legs of the pants, and the right waist area of the T-shirt (Tr. 343-44, 411-13). As Petitioner was being driven back to Jefferson County, he made several voluntary statements indicating that "he had no problem going to Hillsboro but he didn't want to go to Kimmswick because he

had done something bad in Kimmswick." (Tr. 415, 439-40).

When Reverend Reeves was admitted to St. Louis University Hospital, he was suffering from multiple skull lacerations, a depressed skull fracture (indicating pieces of the skull had been driven into the brain), and cerebral contusions (Tr. 376-77). Upon arrival, Reeves was taken to the operating room so that the skull fragments and non-functioning brain tissue could be removed from his brain (Tr. 377, 383-84). Dr. David Crafts, a neurosurgeon who treated Reverend Reeves, testified that the injuries he had sustained were consistent with being hit forcefully with a heavy object, such as a fireplace poker (Tr. 380, 389-90). The skull fragments had penetrated the portion of Reverend Reeves's brain that controls speech (Tr. 382, 384). After the initial surgery, Reeves was placed on a ventilator because he could not breathe on his own (Tr. 384-85). Because of his extensive brain injuries and the fact that he had not improved, Reeves's doctors concluded that his survival was highly unlikely; and even if Reeves did survive, he would most likely remain in a chronic vegetative state (Tr. 384-85, 393-94, 402). After consultation with his family, Reverend Reeves's ventilator was disconnected on June 5, 1994, two days after the attack, and he died several minutes later (Tr. 385, 392-93, 397, 558-60).

Dr. Phillip Burch, a medical examiner for the City of St. Louis, performed an autopsy on Reeves's body on June 6, 1994 (Tr. 285-89). Burch discovered a contusion, or bruise, on the right top of the Reeves's skull, as well as a two-inch long laceration above the right eye (Tr. 290-91). These injuries were

consistent with nonspecific blunt trauma (Tr. 290-91). He also found several holes above the left eye and around the left ear, which had been surgically repaired. These injuries were also consistent with blunt trauma (Tr. 292-93). Reeves's skull had also been fractured at its base (Tr. 293-95, 301-02). Dr. Burch testified that the fireplace poker found at the scene was hard enough to cause the victim's injuries and that those injuries were consistent with having been caused by that poker (Tr. 296-97, 308).

During Reeves's treatment at St. Louis University Hospital, surgeons had removed a five-inch plate of bone, as well as some damaged brain tissue, from Reeves's brain (Tr. 297-99). Dr. Burch found no defensive injuries on the Reeves's hands (Tr. 302-03). He determined that Reeves's death was a homicide caused by a blunt trauma to the head (Tr. 304-05). Dr. Burch concluded that some heavy object had impacted the left side of the Reeves's skull and caused a massive skull fracture (Tr. 306).

Captain Kemp testified at trial that the blood spatters on Petitioner's shoes, which were in the form of "streaks," indicated that the blood was in motion at a slight angle to the shoes at the time it hit the shoes (Tr. 425-26). These spatters were inconsistent with having walked through a pool of blood (Tr. 425-27). One bloodstain was in the form of a circular dot, indicating that the blood had been dripped from somewhere almost directly above the shoe (Tr. 427). Captain Kemp said that when he seized Petitioner's clothes, he saw no indication of any injuries to Petitioner's body and no signs that Petitioner himself had been bleeding (Tr. 426).

With respect to the blood spatters found at the Reeves's residence, Captain Kemp testified that some of the blood was spattered against the walls at a low angle, consistent with someone having been struck with an object while lying on the floor (Tr. 428-29, 431-32). Other spatters were consistent with having been caused by a person being struck while seated in a chair (Tr. 429-30). The blood spatters on Petitioner's T-shirt were consistent with those that would be found on an individual who had struck a victim both while the victim was sitting down and lying on the floor (Tr. 433-34).

Police obtained both a sample of the victim's blood, which was taken during the autopsy, and, by court order, a sample of Petitioner's blood (Tr. 312-15, 471, 473). A criminalist and forensic serologist at the Missouri State Highway Patrol's crime laboratory examined the blood samples from Petitioner and the victim, as well as blood samples taken from the floor of the victim's residence, the fireplace poker, and Petitioner's T-shirt, jeans, and shoes (Tr. 316, 477-80). The jeans, T-shirt and shoes, as well as the poker, all had human blood on them, and the sample taken from the floor was human blood as well; the poker also had human hair on it (Tr. 481-82). By comparing enzymes found in both samples, the serologist determined that the blood found on the poker could not have come from Petitioner (Tr. 482-83).

The serologist also conducted a DNA analysis on the various blood samples (Tr. 483-519). He determined that DNA found on the poker and on Petitioner's jeans was consistent with the victim's DNA and inconsistent with Petitioner's DNA (Tr. 500-14). He also estimated that the victim's DNA

profile occurred at a frequency of one in 100 million in both the Caucasian and black population (Tr. 515-19).

At trial, a teller at the United Postal Savings Bank in Arnold testified that she remembered Reverend Reeves as one of her regular customers (Tr. 362-63). During the winter and spring of 1994, Reverend Reeves would often come to the bank's drive-through window to conduct business. The teller recalled seeing a passenger in the van on several occasions but could not identify the person (Tr. 363-64). Reverend Reeves wrote several checks to the bank between January and April 1994. These checks were cashed by Reverend Reeves and ranged in amount from $150 to $400 (Tr. 365-67).

The teller also testified that a man named Richard Marcrum came in himself on several occasions and attempted to cash checks written to him on Reverend Reeves's account. On at least one occasion Marcrum was asked to produce identification but could not do so (Tr. 368). Reverend Reeves later spoke to the bank's manager and gave the bank permission to cash his checks for Marcrum without identification (Tr. 370-71). Although she could not identify Petitioner in court as being this man, the teller said she also recalled seeing the person she knew as Marcrum in the van with Reverend Reeves (Tr. 369).

After her husband's death, Mrs. Reeves discovered that Reverend Reeves had been altering the balances in the checkbook, apparently to make up for other checks which had not been entered in the register. Although most of the checks that had been written on the account were still among the

family's records, other checks were not there when Katie Reeves went through them (Tr. 550-51, 590-94).

Petitioner testified at trial stating that he could not remember what he did on the day Reverend Reeves was attacked and that he suffered from seizures. Petitioner also presented the testimony of eleven other witnesses on his behalf, including an expert witness, Dr. Allan Barclay, who testified about Petitioner's mental condition (Tr. 620-1061, 1120-1279). The state called one witness in rebuttal. Dr. Sam Parwatikar, who also testified about Petitioner's mental condition. (Tr. 1281-1309). The jury found Petitioner guilty of first degree murder and armed criminal action (Tr. 1376-77). On July 8, 1996, the trial court sentenced Petitioner to consecutive sentences of life imprisonment without the possibility of probation or parole on the first degree murder conviction and life imprisonment on the armed criminal action conviction.

Petitioner appealed, and the court of appeals affirmed (App. 15). Petitioner then sought post-conviction relief under Missouri Supreme Court Rule 29.15 (App. 15-16). After an evidentiary hearing, the circuit court denied post-conviction relief. The Missouri Court of Appeals affirmed (App. 23).

THE PETITION SHOULD BE DENIED

Petitioner contends that the Court should grant discretionary review in order to resolve a conflict between the circuits about whether there should be "cumulative assessment" of prejudice from individual claims of ineffective assistance of trial counsel (Petition, pages 21, 27). This case does not present a viable vehicle for resolving this putative conflict. The issue does not even present itself in the present case. Accordingly, the petition for writ of certiorari should be denied.

In his petition, petitioner complains that the court below "sliced up counsel's errors" and weighed their prejudicial impact without viewing that prejudicial impact cumulatively (Petition, page 29). The ground below was that petitioner received ineffective assistance of trial counsel in connection with counsel's handling of petitioner's mental health defense (App. 2). Strickland v. Washington, 466 U.S. 668 (1984) (ineffectiveness claim consisting of two elements: breach of duty by counsel and resulting prejudice). In the court below, the asserted breaches of duty by petitioner's counsel concern: (1) the introduction of medical records;[1] (2) the cross-examination of the state's expert; and (3) the hiring of a different/second expert (Petition, page 29). No

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[1] Petitioner seems to complain that the court of appeals' analysis does not separately discuss counsel's failure to endorse treating physician witnesses and to introduce medical records (Petition, pages 14-16). Ironically, the court below treated these claims together because the treating physicians would merely have provided foundation for the medical records (App. 39 & n.6).

aspect of the ineffective assistance this claim, singularly or cumulatively, warrants relief; thus, the court below properly denied relief. And that denial of relief is not worthy of discretionary review.

Concerning claim 3, the hiring of a different/second expert, the court below held that petitioner failed to show a breach of duty. "Where counsel has obtained the assistance of a qualified expert on the issue of the defendant's sanity and nothing has happened that should have alerted counsel to any reason why the expert's advice was inadequate, counsel has no obligation to shop for a better opinion" (App. 49-50). Petitioner does not suggest this analysis is wrong or otherwise worthy of discretionary review. Because that issue or claim was resolved on the basis of duty, not prejudice, the facts of this claim present no basis upon which to apply "cumulative assessment" of the prejudicial impact of counsel's errors.

And in connection with claims 1 (medical records) and 2 (cross-examination), the court of appeals actually performed "cumulative assessment" of the prejudicial effect of counsel's errors. In conducting its review of the ineffective assistance of counsel claim, the court of appeals used the standard initially set forth by this court in Strickland v. Washington, 466 U.S. 668 (1984) (App. 28). The court below's application of the Strickland standard was informed by this court's subsequent decisions in Kimmelman v. Morrison, 477 U.S. 365 (1986); Schriro v. Landrigan, 127 S.Ct. 1933 (2007); Rompilla v. Beard, 545 U.S. 374 (2005) and Wiggins v. Smith, 539 U.S. 510 (2003) (App. 28-32). The court of appeals' habeas review was also done through the statutory lenses provided by the

Congress in the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, Title I, Section 104, 110 Stat. 1218; 28 U.S.C. §2254(d) (App. 32-34).

This Court's review of the court of appeals' analysis will show that the court of appeals conducted "cumulative assessment" of the prejudice inquiry. First, petitioner points to no portion of the opinion to show that the court below did not view the prejudicial effect cumulatively[2] (Petition, pages 29-31). Second, the court below actually spoke in terms of the need to scrutinize "counsel's omissions" and the "state courts' assessments of counsel's omissions" (App. 35) (emphasis added). The court below articulated the prejudice standard as a cumulative one.

Third, not only did the court of appeals articulate the standard as cumulative, it also applied that standard cumulatively. "In sum, as we explained below, we conclude that Speer's decisions that may have fallen below the level of acceptable competence did not result in prejudice to Marcrum, and Speer's decisions about what expert to present did not fall below the level of acceptable performance" (App. 37) (emphasis added). The language from the court below emphasized its "cumulative assessment."

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[2] Petitioner refers to other Eighth Circuit decisions that decline to view ineffective-prejudice cumulatively (App. 23 citing Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006) and Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002)). The court below did not rely on either decision in its opinion denying relief (App. 36-52).

Fourth, further evidence of the court of appeals' "cumulative assessment" is found in the analysis of the specific claims. The court of appeals did not examine the 700 pages of medical records page by page, concluding there was no prejudice from each individual page. Instead, treating the records as a whole, the court concluded there was no Strickland prejudice. "Even if the notations had been read to the jury by the treating doctors, there is no reason to think the jury could have digested them and discerned a causal connection between the lack of medication, serial seizures, psychosis and paranoia and violence." (App. 41) (emphasis added). Later in the opinion, the court analyzed the prejudice issue specifically based on two different laboratory reports (App. 41).

Similarly, the court conducted "cumulative assessment" of the cross-examination claim (App. 45-46). The Court can determine that it is "cumulative" because of the court's reference to the entire record (App. 46). The court reasonably concluded that it would have not been productive to impeach state expert Dr. Parwatikar for saying there was no evidence of a connection between Marcrum's psychosis and violent behavior when that conclusion was the same as the conclusions of defendant's expert, Dr. Barclay.

Finally, the cumulative aspect of the court of appeals analysis is manifested in its conclusion:

> It was not objectively unreasonable for the Missouri Court of Appeals to find that Marcrum suffered no prejudice from Speer's failure to

> introduce the medical records or cross-examine Parwatikar.

(App. 49). Petitioner may protest that the court below used a disjunctive connector between "the medical records" and "cross-examine Parwatikar." Even if that contention were correct, if one were to add "no prejudice from Speer's failure to introduce the medical record" to "no prejudice from Speer's failure to.... cross-examine Parwatikar" the result remains the same (App. 49). "No prejudice" plus "no prejudice" equals "no prejudice."

Petitioner may also argue that counsel failed to obtain a second expert. But as noted earlier, the court of appeals resolved that issue on the basis that petitioner failed to show a breach of duty (App. 49-51). Giving all aspects of ineffectiveness ground "cumulative assessment," combining "no prejudice" with "no prejudice" with "no breach of duty," the court of appeals correctly concluded that petitioner "was not denied his right to effective assistance of counsel at trial" (App. 52).

CONCLUSION

Because the issue presented in the petition for writ of certiorari was not actually resolved against petitioner in the court below, the petition for writ of certiorari should be denied.

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